STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CHRISTOPHER H. AND BARBARA J. LUNDING	:	DETERMINATION DTA NO. 810921
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1990.	:	

Petitioners, Christopher H. and Barbara J. Lunding, 276 Otter Rock Drive, Greenwich, Connecticut 06830, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1990.

On July 5, 1993 and July 19, 1993, respectively, petitioners, appearing pro se, and the Division of Taxation by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel) consented to have the instant controversy determined on submission without hearing. Documentary evidence was submitted by the Division of Taxation on June 15, 1992. Petitioners submitted documentary evidence and a brief on September 17, 1993. The Division of Taxation submitted a letter in lieu of a brief on October 12, 1993 and petitioners submitted a reply brief on November 5, 1993. After review of the entire record, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether Tax Law § 631(b)(6) is unconstitutional under the Privileges and Immunities Clause, the Commerce Clause and/or the Equal Protection Clause of the United States Constitution.

II. Whether the principles of stare decisis and collateral estoppel as to the opinion of the Appellate Division, Third Department in the Friedsam case are properly applicable in this matter.

FINDINGS OF FACT

Stipulated Facts

Pursuant to 20 NYCRR 3000.7, the parties stipulated and agreed that the following facts shall be taken as true for all purposes of this proceeding.

In 1990, petitioner Christopher H. Lunding derived substantial income in New York State from his practice of the legal profession in New York State as a partner in the law firm of Cleary, Gottlieb, Steen & Hamilton and worked at the office of that law firm located in the City and State of New York. New York was the principal source of earned income of petitioner Christopher H. Lunding in 1990.

Petitioners timely filed a joint Nonresident New York State Personal Income Tax Return on Form IT-203 for the year 1990 (the "1990 New York return").

Petitioners included $108,000.00 of alimony reported to have been paid in 1990 by petitioner Christopher H. Lunding (the "alimony") on line 18 of the 1990 New York return as part of their total Federal adjustments to income and included 48.0868% of that alimony ($51,934.00) in the "New York State Amount" on that line. Said 48.0868% was the percentage of the 1990 business income of petitioner Christopher H. Lunding reported in Form IT-203-A included in the 1990 New York return as having been derived from or connected with New York State sources.

The Division of Taxation ("Division") of the Department of Taxation and Finance denied this $51,934.00 New York deduction and issued a Notice of Deficiency against petitioners on March 16, 1992, for the stated reason that Tax Law § 631(b)(6) provides that the deduction for alimony allowed by section 215 of the Internal Revenue Code of 1986 shall not constitute a deduction derived from New York sources for nonresident individuals.

The effect of this denial was to increase petitioners' alleged New York State personal income tax liability for 1990 (excluding interest) by $3,724.00 (the "disputed amount") from the total New York State personal income tax liability shown by petitioners on the 1990 New York return as originally filed.

In the event that Tax Law § 631(b)(6) is a valid, constitutional statute (as the Division contends), petitioners owe the disputed amount. In the event that Tax Law § 631(b)(6) is unconstitutional (as petitioners contend), petitioners do not owe the disputed amount.

On June 10, 1992, petitioners duly filed a petition in the Division of Tax Appeals seeking a redetermination/revision of the above-referenced Notice of Deficiency. On August 28, 1992, the Division duly filed its answer to this petition.

Additional Facts

At all times since 1980, petitioner Christopher H. Lunding has been a resident of the State of Connecticut and has resided continuously at 276 Otter Rock Drive, Greenwich, Connecticut, approximately two miles from the New York State border.

On July 7, 1989, a judgment was entered in the Superior Court of the State of Connecticut, at Bridgeport, Connecticut, adjudging and declaring the marriage of petitioner Christopher H. Lunding to his then spouse to be dissolved, and ordering the parties to that action to comply with the Separation Agreement between them, dated May 31, 1989 (the "Separation Agreement"), which was incorporated by reference into that judgment.

The Separation Agreement requires petitioner Christopher H. Lunding to pay alimony to his former spouse in the annual amount of $108,000.00, which alimony was in fact paid by Mr. Lunding in 1990. Mr. Lunding's former spouse was a resident of the State of Connecticut at all times in 1990.

On August 19, 1989, petitioner Christopher H. Lunding married petitioner Barbara J. Lunding at Greenwich, Connecticut. Since that date, petitioners have resided continuously at 276 Otter Rock Drive, Greenwich, Connecticut.

Prior to the issuance of the Notice of Deficiency, the Division issued to petitioners a Statement of Proposed Audit Changes. The statement indicated that:

> "A nonresident is not allowed the Federal deduction for alimony paid because it is not considered a deduction from income derived from New York sources. (Section 631[b][6] of the New York State Tax Law)."

The statement also provided a computation of tax due for the year 1990 based upon the

disallowance of the deduction for alimony paid as follows:

"TAX PERIOD ENDED DATE: 12/31/90
TAX YEAR: 1990 FILE DUE DATE: 08/15/91 DATE RECEIVED: 07/30/91
FILING STATUS: 02
CORRECTED NEW YORK LINE 18: $17,741.00
CORRECTED NEW YORK LINE 19: $402,422.00

New York State Tax:		$56,487.00
Income Percentage:		.5106
Allocated New York State Tax:		$28,842.00
Tax Previously Stated/Adjusted:	$25,118.00	
Additional Tax Due:	$3,724.00	

Tax Per Taxpayer:	25,119.00
Tax Per Dept of Tax & Finance:	28,842.00
Timely Payments/Credits:	45,251.00
Late Payments:	0.00
Amount Previously Assessed/Refunded:	20,133.00-
BALANCE:	3,724.00

Tax Amount Assessed: 3,724.00"

CONCLUSIONS OF LAW

A. Internal Revenue Code § 215(a) provides as follows:

"GENERAL RULE - In the case of an individual, there shall be allowed as a deduction an amount equal to the alimony or separate maintenance payments paid during such individual's taxable year."

B. Tax Law § 631(a) provides that the New York source income of a nonresident individual shall be the sum of the net amount of items of income, gain, loss and deduction entering into his Federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources. Tax Law § 631(b)(6) provides that the deduction allowed by Internal Revenue Code § 215, relating to alimony, shall not constitute a deduction derived from New York sources. There is no such provision of the Tax Law which disallows the deduction of alimony applicable to residents of New York State.

C. The background of Tax Law § 631(b)(6) is important to the development of the matter at hand, starting with Matter of Friedsam v. State Tax Commn. (98 AD2d 26, 470 NYS2d 848, affd 64 NY2d 76, 484 NYS2d 807). Mr. Friedsam was a Connecticut resident employed in New York State, who claimed alimony payments to his former wife (also a Connecticut

resident) as an adjustment to income on his nonresident tax return. In computing his New York adjusted gross income, Mr. Friedsam modified his Federal adjusted gross income so as to take credit for alimony paid only in the same proportion as was represented by the New York portion of his salary. The Division disallowed the deduction ruling that it did not relate to the production of New York income. Following an appeal, the former State Tax Commission concluded that alimony is not a deduction attributable to the petitioner's profession carried on in this State, within the meaning of Tax Law former § 632(b)(1)(B) and, therefore, not a proper adjustment to income in computing the petitioner's New York adjusted gross income. Special Term, Albany County, granted the petitioner's Article 78 application and held that because a resident is allowed alimony paid as an adjustment against income while a nonresident is not, the difference in treatment, without a substantial reason, was violative of the Privileges and Immunities Clause of the United States Constitution (US Const, art IV, § 2, cl 1). In affirming the judgment of Special Term, the Appellate Division, Third Department held the Division's contention, that the disparate treatment of nonresidents was justified by the personal nature of the alimony deduction, to be without merit.

The New York Court of Appeals affirmed the order of the Appellate Division, but did so upon statutory, not constitutional, grounds. The Court of Appeals held that the Division's disparate tax classification between resident and nonresident taxpayers is contrary to statute and tax policy of New York State. Mr. Friedsam sought an alimony deduction proportional to the ratio of his New York income derived from all sources. The amount by which he reduced adjusted gross income for his alimony payment was commensurate with the income derived from New York sources, and was consistent with the reduction allowed to residents under similar circumstances. The Court of Appeals concluded that the Division, in disallowing Mr. Friedsam's alimony deduction, had improperly applied Tax Law former § 632(a)(1) and failed to apply Tax Law former § 635(c)(1) (apportionment of nonresident's itemized deductions). According to the Court, the passage of Tax Law former § 635(c)(1) reflected a policy decision that nonresidents be allowed the same non-business deductions as residents, but

that such deductions be allowed to nonresidents in the proportion of their New York income to income from all sources.

D. Tax Law § 631(b)(6) was enacted by the Legislature as part of the Tax Reform and Reduction Act of 1987 (L 1987, ch 28, § 78). The main purposes of the Act were to conform State tax law to the Federal reforms effected by the Federal Tax Reform Act of 1986; return the resulting windfall to New York taxpayers; simplify the calculation of State taxes for most taxpayers; and change the system of taxation of nonresidents and part-year residents. In addition, the Act specifically provided that the deduction for alimony allowed by the Internal Revenue Code shall not constitute a deduction derived from New York sources.

Under Tax Law § 601(e), a nonresident individual computes his New York taxable income by first determining what the tax due would be if he were a resident individual and then by multiplying the tax shown as due by a fraction whose numerator is his New York source income and whose denominator is his Federal adjusted gross income. In computing the tax as if a resident and computing his Federal adjusted gross income, the individual has deducted alimony payments made to his ex-spouse. However, he cannot deduct such payments in computing his New York source income numerator since, under Tax Law § 631(b)(6), alimony paid by a nonresident is not considered a deduction derived from New York sources. This section specifically reversed Friedsam v. State Tax Commn. (supra). The effect of the allowance of the deduction in the base and the denominator and disallowance in the numerator is that the taxpayer cannot get the benefit of a proportional deduction of the alimony payments made to his ex-spouse (see, TSB-A-90[3]-I).

E. Petitioners contend that the denial of alimony as a deduction by Tax Law § 631(b)(6) violates the Privileges and Immunities Clause, the Commerce Clause and the Equal Protection Clause of the United States Constitution. It has been recognized that the jurisdiction of the Tribunal and the Division of Tax Appeals is prescribed by the enabling legislation (Matter of Fourth Day Enterprises, Tax Appeals Tribunal, October 27, 1988). This jurisdiction does not include a challenge that a statute is unconstitutional on its face (see, e.g., Matter of Unger, Tax

Appeals Tribunal March 24, 1994; Matter of Bucherer, Inc., Tax Appeals Tribunal, June 28, 1990; Matter of Fourth Day Enterprises, supra; cf., Matter of J. C. Penney Co., Tax Appeals Tribunal, April 27, 1989 [holding that the issue of the constitutionality of the Tax Law as applied was properly before the Tribunal]). Therefore, petitioners' arguments are rejected because the liability asserted herein is based on the statute cited above and it is presumed that the statute involved is constitutional (Califano v. Sanders, 430 US 99; Matter of Fourth Day Enterprises, supra).

F. Petitioners contend that the principles of collateral estoppel and stare decisis are applicable to this matter in relation to Friedsam v. State Tax Commn. (supra).

Collateral estoppel[1] is a doctrine which is a narrower form of res judicata. In essence, it precludes a party from relitigating, in a subsequent action or proceeding, an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same (Ryan v. New York

Telephone Co., 62 NY2d 494, 478 NYS2d 823; see generally, Siegel, NY Prac § 443, at 673 [2d ed]).

In Capital Telephone Co. v. Pattersonville Telephone Co. (56 NY2d 11, 451 NYS2d 11), the Court of Appeals held that collateral estoppel (or its more modern name "issue preclusion") applies to administrative as well as judicial proceedings. This is true as long as the determination of the administrative agency was rendered pursuant to the adjudicatory authority of the agency to decide cases brought before its tribunal employing procedures substantially similar to those used in a court of law (Staatsburg Water Co. v. Staatsburg Fire District, 72 NY2d 147, 531 NYS2d 876). In either type of proceeding, requirements for application of the doctrine are: (1) that the issue as to which preclusion is sought be identical with that in the

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[1]Since stare decisis is a policy of adherence to decided cases, which is what is sought by petitioners in their collateral estoppel defense, for purposes of this matter only the applicability of collateral estoppel shall be considered herein.

prior proceeding; (2) that the issue was necessarily decided in the prior proceeding; and (3) that the litigant who will be held precluded in the present matter had a full and fair opportunity to litigate the issue in the prior proceeding (B. R. Dewitt, Inc. v. Hall, 19 NY2d 141, 278 NYS2d 596). The courts have also held that the burden of establishing that the issue was identical and that the issue was necessarily decided in the prior proceeding is on the proponent of preclusion. As to the question of full and fair opportunity to contest the issue, the burden is on the party who opposes preclusion.

If the issue has not been litigated, there is no identity of issues between the present action and the prior determination (Kaufman v. Lilly & Co., 65 NY2d 449, 492 NYS2d 584). For a question to have been actually litigated so as to satisfy the identicality requirement, it must have been properly raised by the pleadings or otherwise placed in issue and actually determined in the prior proceeding (Matter of Halyalkar v. Board of Regents, 72 NY2d 261, 532 NYS2d 85; Schwartz v. Public Admr. of County of Bronx, 24 NY2d 65, 298 NYS2d 955; Matter of Sterling Bancorp, Tax Appeals Tribunal, November 18, 1993). In the instant case, petitioners challenge the validity of Tax Law § 631(b)(6). Clearly, the validity of Tax Law § 631(b)(6) was not actually litigated in the Friedsam case; thus, there is no identity of issue between the issue in the Friedsam case and the issue here.

In view of the fact that estoppel is an elastic doctrine, based on general notions of fairness involving a practical inquiry into the realities of litigation (Matter of Halyalkar v. Board of Regents, supra), the principles of which are not to be applied in a mechanical fashion (Staatsburg Water Co. v. Staatsburg Fire Dist., supra) and that the use of the doctrine "offensively" by a nonparty in the prior litigation (here, petitioners) in some cases raises legitimate concerns about the fairness of its application (Matter of Halyalkar v. Board of Regents, supra), it is concluded that because the validity of Tax Law § 631(b)(6) was not challenged in the Friedsam case, the doctrine is not applicable in this case.

G. The petition of Christopher H. and Barbara J. Lunding is denied.

DATED: Troy, New York
April 28, 1994

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE